United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 31, 1997

TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: National Steel & Shipbuilding Company 530-6050-1612-5000
Case 21-CA-31707 530-6067-4033-6700
530-6067-4044-6700

This case was submitted for advice as to whether the Employer applied a merit-based layoff/recall policy without first bargaining to impasse over objective criteria in violation of the Employer's obligations set forth in Colorado-Ute.[1]

FACTS

National Steel & Shipbuilding Co. ("Employer" or "NASSCO") operates a shipyard in San Diego, California. The Charging Party Unions constitute seven labor organizations which represent tradesmen and women who work at the San Diego facility.

The latest collective-bargaining agreement between the parties expired in September 1992. The parties have been in negotiations for a successor agreement since that date. Under the prior agreement, seniority governed the order of employee layoffs and recalls. However, during the 1992-93 round of bargaining, the Employer insisted on replacing this seniority-based system with one in which the results of employee performance evaluations would determine the order of layoffs and recalls. Under the Employer's proposal, supervisors evaluate each employee under three criteria, Ability, Skill and Efficiency. The Employer assigns numerical scores for Ability by evaluating whether employees can perform standardized "basic abilities" and more advanced "additional abilities" specific to their chosen trade. Employees who are cross-trained for other trades or who pass a "full assessment test" for their own trade receive the

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[1] Colorado-Ute Electric Ass'n, 295 NLRB 607 (1989), enf. den. 939 F.2d 1392 (10th Cir. 1991), cert. den. sub nom. IBEW Local No. 111 v. Colorado-Ute Electric Ass'n, 504 U.S. 955 (1992).

highest ranking. Low-scoring employees or those employees desiring cross-training may seek further training. Supervisors assess an employee's Skill level (encompassing the use of tools, expertise, quality of work and safety) by comparing his or her performance with a standard list of attributes. The more attributes the employee meets, the higher his or her rating. An employee's Efficiency score is assessed as a function of attendance and punctuality. The Employer assigns each employee a numerical rating based on these three factors which, in turn, determines layoff/recall rights.[2]

On February 19, 1993, the Unions rejected the Employer's final offer which included its layoff/recall proposal to substitute performance evaluations for seniority. On April 27, 1993, the Employer implemented the final offer. The Unions subsequently filed unfair labor practice charges against the Employer alleging that the implementation of the final proposal -- and specifically, the implementation of the new employee evaluation policy -- constituted an unlawful unilateral change. On August 16, 1993, the Region dismissed the Unions' charges and the Office of Appeals subsequently denied the Unions' appeal.[3]

The parties have continued to bargain for a successor agreement up to the present date. Through the past four years the Employer has relied upon the implemented performance evaluation procedure to determine the order of employee layoffs and recalls. However, since the fall of 1996, the Unions have demanded to bargain over each proposed layoff and, consequently, that the Employer refrain from laying off any employees pursuant to that policy unless and until there is agreement on the ratings assigned to individual employees. Despite their bargaining demands, the Unions have not moved off their initial position rejecting the performance evaluations policy in its entirety.

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[2] The Unions also maintain that employee performance ratings determine promotions, demotions and changes in employee classifications.

[3] In so concluding, the Region simply held that the parties reached a good-faith impasse prior to implementation. It did not subject the Employer's actions to a Colorado-Ute analysis.

To date, the Employer has not agreed to meet and confer with the Unions over each layoff. It has also repeatedly rejected the Unions' demand for copies of worksheets it uses to tally Ability, Skill and Efficiency ratings; its refusal to furnish this information is the subject of an outstanding Section 8(a)(5) complaint allegation.[4] However, the Employer apprises employees of their overall summary rating each month. Although grievances regarding employee layoffs and recalls are permitted under the implemented contract, the Union cannot grieve fundamental factors leading to an employee's layoff or recall, i.e., the underlying ratings of work performance which are determined by management through the implemented evaluation policy.[5] However, on occasion the Employer has adjusted individual evaluations when they have been challenged on a specific, factual basis (e.g., failure to recognize an employee has passed certain tests).

ACTION

We conclude that complaint should issue alleging that the Employer unlawfully refused to bargain with the Union over the application of the evaluation policy as to individual employees.

In Colorado-Ute, supra, the Board concluded that an employer lawfully can insist to impasse on a merit pay proposal which gave the employer unlimited discretion to determine merit wage increases, but that a bargaining impasse did not privilege the employer's unilateral exercise of its discretion in granting merit increases.[6] The Board

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[4] The Region also intends to issue a Section 8(a)(3) complaint in Case 21-CA-31802 (currently held in abeyance pending resolution of the instant allegations) alleging that the Employer discriminatorily applied the employee performance evaluation policy against a union steward in order to lower his rankings, thereby making him more vulnerable to layoff.

[5] The parties have occasionally agreed to submit other types of labor disputes to arbitration on an ad hoc basis.

[6] Colorado-Ute, 295 NLRB at 608-10 (Board held that a proposal for unlimited management discretion in determining merit wage increases required the union's waiver of its statutory rights under Section 8(a)(5) of the Act).

subsequently refined its reasoning in McClatchy Newspapers,[7] where it concluded that discretionary merit increase proposals, where there has been no good faith bargaining over criteria and procedures, timing and amounts, fall into the narrow class of mandatory subjects that cannot be implemented after impasse, i.e., that such a proposal constitutes an exception to the "implementation after impasse" rule. The Board held that unilateral implementation of such proposals -- even after good-faith impasse -- is inconsistent with the employer's established duty to bargain over procedures and criteria for determining merit increases for bargaining unit employees. Thus, the Board concluded that the "open-ended, intermittent disruption of collective bargaining" resulting from entirely discretionary shifts in wage rates was "inimical" to the policies of the Act because the employer's unilateral actions bypassed and disparaged the union as the employees' bargaining representative.[8]

Nonetheless, the Board expressly limited this exception to the "implementation after impasse" doctrine to instances where an employer fails to bargain to impasse or agreement over procedures and criteria of a merit-based program prior to implementation. The Board expressly acknowledged that,

> Nothing in our decision precludes an employer from attempting to negotiate to agreement on retaining discretion over wage increases. And, absent success in achieving such an agreement, nothing in our decision precludes an employer from making merit wage determinations if definable objective procedures and criteria have been negotiated to agreement or to impasse.[9]

We conclude that under the facts here the Employer has bargained to impasse over "definable objective procedures and criteria" sufficient to afford it the right to continue using its employee evaluation policy within the Section

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[7] 321 NLRB 1386 (1996), on remand from NLRB v. McClatchy Newspapers, 964 F.2d 1153 (D.C. Cir. 1992).

[8] Id. at 1391.

[9] Ibid.

10(b) period.[10] The Employer derives employee Skill and Ability ratings under its implemented program by comparing the results of employee proficiency exams to performance standards specific to that employee's chosen trade. There is no evidence that the Employer has the discretion to forgo this procedure at will or that the performance standards against which employees are judged do not objectively appraise trade proficiency.[11] The third element, Efficiency, also appears to be objectively based insofar as it is entirely dependent on an employee's punctuality and attendance record. The use of subjective judgment by a supervisor or manager to evaluate employee capabilities, like a trainer in a union-certified apprenticeship program, does not necessarily invoke a bargaining obligation. Rather, an employer must bargain with the union only where evaluations are so lacking in objective criteria as to give the Employer the complete discretion to rank employees as it sees fit. Such is not the case here.

Nonetheless, even after an employer lawfully implements a non-discretionary, merit-based policy, it remains obliged to meet and confer with the union about any reasonable concerns the union may have that the employer is misapplying

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[10] Insofar as the parties are at impasse over the evaluation policy, the only possible Section 8(a)(5) violation herein would be the Employer's failure to bargain over the continued application of the policy rather than its 1993 implementation. Consequently, the Section 10(b) period would begin to run only if the Employer refuses to meet with the Unions after they are on notice that the Employer has misapplied its evaluation policy, as articulated below.

[11] Compare Oneita Knitting Mills, 205 NLRB 500 n.1 (1983) (bargaining obligation over implementation of merit-pay program which predated bargaining relationship exists only "to the extent that discretion has existed in determining the amount of timing of the increases") with Matheson Fast Freight, 297 NLRB 63, 76 (1989), (no obligation to bargain over change in employees' start times which fluctuated as a direct response to changes in the amount of work rather than the employer's sole discretion) and Charles Manufacturing Company, 245 NLRB 39 n.1 (1979) (no obligation to bargain over wage increase which employer unconditionally promised prior to rise of bargaining obligation where promise was "devoid of any element of discretion").

its own policies.[12] In other words, NASSCO must meet and bargain with the Unions over alleged discrepancies in performance rankings which are based on identifiable, objective factors. Apart from Case 21-CA-31802, the Unions apparently do not allege at this time that the Employer has applied the performance ranking policy as to a specific individual or individuals in an erroneous, inconsistent, or haphazard manner.[13] Nonetheless, the Unions have clearly demanded bargaining over the impact of the evaluation policy on each proposed layoff. The Employer, however, has refused to meet and confer with the Unions. Thus, we conclude that the Employer has violated its obligation to bargain over the application of its policy on unit employees, entirely apart from the fact that, absent a break in impasse, it has no similar obligation to bargain over the substance of a facially non-discretionary program which was lawfully bargained to impasse and implemented more than four years ago.[14] Moreover, if the Employer has refused the Unions'

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[12] See Tex-Tan Welhausen Company, 172 NLRB 851, 880 (1968), judgment vacated and case remanded to circuit court 397 U.S. 819 (1970), reaffirmed in relevant part, 434 F.2d 405 (5th Cir. 1970). In that case, the Board affirmed the Trial Examiner who held that the employer bargained in bad faith by insisting to impasse on a merit wage policy which it exempted from the contractual grievance process. The Trial Examiner noted that, "Congress explicitly provided in Section 8(d) of the Act that to bargain collectively includes the mutual obligation to confer in good faith with respect to any question arising under the collective agreement -- i.e., with respect to grievances." Accord: McClatchy Newspapers, 299 NLRB 1045, 1050 (1990), citing Tex-Tan. See also NLRB v. Katz, 369 U.S. 736 (1962).

[13] The Employer apparently refuses to accept grievances over rankings it gives to individual employees.

[14] Of course, the fact that the Employer apparently abused its lawfully implemented policy by enforcing it against a Union advocate in a disparate manner does not, by itself, establish that the procedures and criteria underpinning the policy itself are discretionary on their face. Cf. Elevator Constructors (Long Elevator), 289 NLRB 1095, 1098 (1988) (unlawful application of an otherwise valid rule does not establish that rule itself is facially unlawful). However, as set forth above, the Employer may not lawfully refuse to meet with the Unions to confer over the Employer's

demand to bargain over rankings given to any unit employee which is used for any purpose related to a mandatory subject of bargaining (such as layoffs, recalls, promotions, demotions, or changes in employee classifications), the Region should also allege the failure to bargain as a Section 8(a)(5) violation, consistent with the analysis set forth herein.

Accordingly, we conclude that complaint should issue alleging that the Employer unlawfully refused to bargain with the Union over the application of the evaluation policy as to individual employees.

B.J.K.

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discriminatory application of the policy against the Union steward.